IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-804

RICHARD T. HILL,

Petitioner-Respondent,

vs.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 25, et al.,

Defendants-Appellants.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

G. DANA HOBART
GERALD KANE
3008 Wilshire Boulevard, Suite 200
Los Angeles, California 90010
(213) 385-5154

Attorneys for Petitioner-Respondent

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. _____

RICHARD T. HILL,

Petitioner-Respondent,

vs.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 25, et al.,

Defendants-Appellants.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

G. DANA HOBART
GERALD KANE
3008 Wilshire Boulevard, Suite 200
Los Angeles, California 90010
(213) 385-5154

Attorneys for Petitioner-Respondent

TOPICAL INDEX

TABLE OF AUTHORITIES

Cases

Constitutions

Statutes

Texts

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD T. HILL,

Petitioner,

vs.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 25, et al.,

Defendants-Appellants.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard T. Hill, respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, in the case of Hill v. United Brotherhood of Car. & Join. of A., Loc. 25 (1975) 49 Cal. App. 3rd 614, 122 Cal. Rptr. 722.

OPINION BELOW

The opinion of the Court of Appeal is reproduced in Appendix A.

JURISDICTION

The judgment of the Court of Appeal was entered on June 30, 1975. (See Appendix A.) A timely petition for hearing in the California Supreme Court was denied without opinion on September 10, 1975. (See Appendix B.) This Petition for Certiorari is filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3).

QUESTION PRESENTED

At issue herein is whether a union member who is subjected to protracted and intentional infliction of grievous emotional distress by officials of his union in pursuance of a vicious personal vendetta and in clear violation of state tort law may bring an action in state court for damages for redress of the injury done him, or

whether such action should be deemed preempted by the Labor Management Relations Act of 1947 (29 U. S. C. §§141, et seq.), which does not address itself to such tortious misconduct, and the subject matter of the action deemed within the exclusive jurisdiction of the National Labor Relations Board, which lacks the power to provide effective redress.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved herein are Sections 7 and 8 of the Labor Management Relations Act. These are set out in pertinent part in Appendix C.

STATEMENT OF THE CASE

A. Factual Background

Plaintiff and Petitioner Richard T. Hill was at all relevant times a carpenter by trade. (RT 472.) At all relevant times, he has belonged to Defendant and Respondent Local 25 of the United Brotherhood of Carpenters and Joiners of

America. (RT 473.)[1/]

In 1965, Petitioner was elected to a three-year term as vice-president of Local 25. (RT 473-474.) In the course of the performance of his official duties, Petitioner came increasingly into conflict with one of the Local's business agents, Defendant and Respondent E. G. "Blackie" Daley, who, though only one of three business agents for the Local, held effective control of the Local's affairs. (RT 475, 1684, 1900-1901.)

Petitioner disagreed with Daley on a number of subjects, including rules governing dispatch of workers from the Local's hiring hall, the propriety of loans made by the Local's credit union and the use or misuse of union funds. (RT 484-486, 495-496, 498-501.) By the end of 1966 Petitioner and Daley had become openly hostile. (RT 809-810, 1520, 1554.) In early 1967, Petitioner incurred Daley's further displeasure by filing intra-union charges against Daley for misuse of union funds. (RT 587-588.) Somewhat later, Petitioner decided to run for the office of Local President in the 1968 election, and to oppose Daley's re-election as business agent. He so informed Daley. (RT 666.)

1/ References to the Reporter's Transcript will be made herein by the letters "RT," followed by page numbers. References to the Clerk's Transcript will be made by the letters "CT," followed by page numbers.

Petitioner's opposition to Daley and to Daley's policies triggered a campaign of intimidation directed at Petitioner (and sometimes at those seen associating with him) by Daley and those effectively under Daley's control. This campaign, which began in late 1966, took the form of numerous and continuing threats of starvation, frequent public ridicule, incessant verbal abuse, most of it profane, and, on at least one occasion, actual battery. (RT 492, 505, 528-529, 533, 591-593, 1063-1066, 1556-1560, 1598, 1664, 1670, 1685-1686.) More significantly, it involved refusal to dispatch Petitioner from the Local's hiring hall to any but the briefest and least desirable jobs, in violation of express intra-union rules and provisions of the union-management agreement governing the operation of the hiring hall and in contravention of long-established hiring hall practices. (RT 249-269, 320-323, 374, 407-408, 429, 440, 539, 1121, 1166-1167, 1197-1198, 1362-1363, 1436, 2625-2630; Ex. 3.)

The record establishes that Daley and other Local officials under his control went to extraordinary lengths to prevent Petitioner from obtaining his proper share of work for the express purpose of driving Petitioner from the Local. (RT 529, 533, 1558-1560, 1664.) Daley and his subordinates falsified union records to justify removing Petitioner from the top of the Local's out-of-work list and placing him at the bottom, thereby causing weeks of unemployment. (RT 507, 881-882, 1230-1231,

1246, 1444, 2639-2658; Ex. Q.) They deliberately offered him jobs for which he was not qualified and used his refusal of such jobs as a pretext for placing him at the end of the out-of-work list and effectively out of work for periods of weeks. (RT 507-510, 637-640, 656-660, 2157, 2164-2166.) They dispatched Petitioner to jobs of short duration, jobs which he would have had a right to refuse without penalty, but of whose short duration he was told nothing, even though the usual practice was to tell the affected member of that fact before he accepted such a dispatch. They then used his acceptance of employment of short duration (2 or 3 days) as the basis for moving his name to the bottom of the list. At the same time, others under Hill were receiving dispatches of several months' duration. (RT 263, 623-624, 636, 647, 1121, 1196-1198, 1362-1363, 1436.) On one occasion, they even dispatched him to a job that did not exist, effectively preventing him from obtaining one of several good dispatches that day. (RT. 642-646; see also 636-640, 2157, 2164-2166, 2173, 2658; Ex. 83.)

Unable to secure a job through ordinary hiring hall dispatching procedures, Petitioner approached potential employers in an attempt to get them to request the hiring hall to dispatch him, a permitted and not uncommon practice for out-of-work carpenters. One employer did specifically request Petitioner's dispatch, but Local officials, in violation of hiring hall rules, refused to dispatch Petitioner. (RT 539-559, 572-576, 1505-1508.)

Daley on one occasion also used Petitioner's refusal of a job for which he was not qualified as an excuse to report to the Department of Employment that Petitioner was unavailable for work, thereby causing Petitioner's unemployment benefits to be cut off pending the Department's review of the matter. It was unprecedented for any such refusal to be reported to the Department of Employment in that fashion. (RT 472, 507-518, 1561-1562.)[2/]

Petitioner's attempts to secure redress of the misconduct of Daley and the other officials under his control brought him scant relief. Petitioner complained to the National Labor Relations Board in May of 1967 about the Local's refusal to dispatch him in response to the specific employer request and was awarded some $2500 in lost wages. (RT 671, 2683-2685.)[3/] Far from

---

2/ Petitioner's benefits for the affected period were later paid him. (RT 893.)

3/ The Court of Appeal correctly noted that this was not the only occasion on which Petitioner went to the Board. (Appendix A.) The record provides no support, however, for the Court's apparent belief that there were several further charges filed or that any of them concerned job referral discrimination. The record reveals only that one additional charge was filed and later withdrawn. It does not disclose the nature of that charge. (RT 2686-2691.)

deterring the misconduct of Daley, however, the charges and the award provoked an even more intense course of threats and intimidation. (RT 675.)

Petitioner also sought redress from the Los Angeles District Council of the United Brotherhood of Carpenters and Joiners, also a Defendant and Respondent herein, several times complaining to it of his mistreatment at Daley's hands. The District Council in each instance refused to do anything in response to Petitioner's entreaties. (RT 579-582, 593-599; Ex. 9, 11, 12.)

Through the efforts of Daley and those under his control, Petitioner remained unemployed, except for jobs of brief duration, from early 1967 until mid-1968. (RT 616-624, 2477-2478.) During this time, he was forced to subsist on unemployment benefits, disability benefits and $2200 in savings bonds which he had accumulated over the years. (RT 576, 609-611; Ex. 9.) The frustration of forced idleness, the continuing erosion of his savings and the effects of the open hostility of Daley and other officials loyal to Daley soon took their toll on Petitioner's health. The nervous stress engendered by the campaign of intimidation and job discrimination caused Petitioner to suffer headaches, dizziness and gastrointestinal distress. (RT 534-536.) Petitioner had little desire to eat or drink and lost 40 pounds during the period. (RT 540, 576.) Petitioner was hospitalized in April of 1967 for tests, but no organic cause was found for his

symptoms, his doctor determining that the symptoms resulted from his employment problems and his conflict with Daley. (RT 535-538, 575-576, 1732, 1747-1758, 1763-1766.) Petitioner was unable to work and under a doctor's care from early April of 1967 until May, and again from later in May until December of 1967. (RT 538, 574-576, 616.)

Daley's attempts to drive or starve Petitioner out of Local 25 continued until mid-1968. As he had earlier warned Daley, Petitioner did run for the presidency of the Local in 1968 and campaigned actively against Daley when the latter sought re-election as Local business agent. (RT 669.) Petitioner was narrowly defeated, but Daley was also defeated and Petitioner's two-year ordeal came finally to an end. (RT 667-670.)

B. Procedural Background

On April 17, 1969, Petitioner filed this action for damages against the United Brotherhood of Carpenters and Joiners, against Local 25 and the District Council, and against Local Business Agent E. G. Daley and certain other officials of Local 25 in the Superior Court for the County of Los Angeles in Los Angeles, California. The relevant pleading herein is Petitioner's First Amended Complaint, which contains four causes of action. The first cause

of action substantially pleaded a breach of the union's duty of fair representation. The second pleaded intentional infliction of emotional distress. The third pleaded fraudulent misrepresentation. The fourth pleaded breach of contract. (CT 102-114.) The Defendants demurred to all causes of action (CT 127-128) and their demurrer was sustained as to the first, third and fourth causes of action, without leave to amend. (CT. 190.) The basis of this ruling was that the subject matter of these causes of action was preempted by the Labor Management Relations Act.

Petitioner's action went to trial on the single remaining cause of action for intentional infliction of emotional distress. (RT 1.) On February 5, 1973, pursuant to a jury verdict, judgment was rendered on that remaining cause of action against Daley, Local 25 and the District Council in the amount of $7500 in compensatory damages and $175,000 in punitive damages. (CT 570-572.)[4/] All three appealed from the judgment (CT 645) and the Court of Appeal of the State of California, Second Appellate District, in a published opinion authored by Justice pro tempore Charles Loring, reversed. Although Respondents made a number of assignments of

---

4/ Judgment was never entered with respect to the other causes of action. Their present status is a matter of continuing dispute, but that fact does not affect this Petition.

error, the sole basis for that reversal was that Petitioner's action was preempted by the Labor Management Relations Act. (See Appendix A.)

A timely petition for hearing in the Supreme Court of the State of California was denied on September 10, 1975. (See Appendix B.)

REASONS FOR GRANTING THE WRIT

A. Preliminary Statement

Petitioner submits that the doctrine of preemption has been misapplied in this case, and that his substantial rights have been needlessly sacrificed in order to avoid an essentially imaginary conflict between federal labor law and California's law of torts.

If the decision below in fact represents a correct application of the preemption doctrine as it now exists, Petitioner submits that serious reconsideration of that doctrine is in order. Indeed, the preemption doctrine as it has developed in the law of labor relations is unclear, uncertain in its application, frequently productive of manifest injustices, and but poorly promotive of the purposes it is intended to serve. The instant action, if in fact it is preempted, illustrates as

well as any case could the deficiencies of the principle as it is now formulated.

B. Purpose and Scope of the Labor Management Relations Act

The basic purpose of the Labor Management Relations Act of 1947 was and is to establish an orderly process for employee self-organization and for the initiation and maintenance of collective bargaining between organized employees and their employers, thus eliminating the chief sources of the industrial strife and unrest which had characterized the period preceding legal recognition of the labor movement. (29 U. S. C. §§141, 151.) In light of the Act's manifest purpose, it is hardly surprising that those provisions of the Act which regulate the behavior of the parties to the process focus almost exclusively on conduct which impinges on that process and only incidentally, if at all, on conduct which does not. (29 U. S. C. §§157, 158.)

C. The Preemption Principle

1. The doctrine of preemption as it is applied in the law of labor relations is in actuality a marriage of two separate but somewhat

similar concepts.

a. On one hand, the doctrine is an application of the traditional principle of preemption. Congressional power over labor relations stems from the interstate commerce clause of the Constitution (U.S.Const. Art. 1, §8; NLRB v. Jones & Laughlin Steel Corp. (1937) 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893). The term preemption suggests federal displacement of state power over interstate commerce, and thus over labor relations, in one of two ways. First, as indicated in Cooley v. Board of Wardens (1851) 53 U. S. (12 How.) 299, 319-32, 13 L. Ed. 996, some aspects of interstate commerce are so demanding of uniform national regulation that their regulation, if any, must be by a single authority, and under the supremacy clause (U. S. Const. Art. 6) that authority can only be Congress. Second, where the states are not preempted by the bare constitutional grant of power to Congress, state power may still be displaced by legislation which, through the supremacy clause, preempts some or all of the field. (See Note, Federal Preemption in Labor Relations (1968) 63 Nw. U. L. Rev. 128, 129-130.) Labor relations is not one of the aspects of interstate commerce deemed directly foreclosed to the states by the Constitution, and to the extent that the states are preempted this is the result of Congress' enactment of national labor legislation. (Ibid.) For this reason, application of the doctrine in the area of labor relations law involves defining the scope of permissible state activity in light of the objectives sought to be promoted by the federal legislation.

b. On the other hand, the pre-emption doctrine as applied to labor relations law also embraces a principle of primary jurisdiction, the Congress having vested the National Labor Relations Board with the sole authority to interpret and enforce the exclusively federal law of labor relations, subject only to limited review by the courts. (29 U. S. C. §160; Bryson, A Matter of Wooden Logic: Labor Law Preemption and Individual Rights (1973) 51 Tex. L. Rev. 1037, 1038-1039.) The principle of primary jurisdiction rests on essentially the same foundation as true preemption: To confer concurrent jurisdiction upon the courts risks fragmentation, inconsistency and conflict where a unitary policy is desirable or necessary. (See Garner v. Teamsters Local 776 (1953) 346 U. S. 485, 490-91, 74 S. Ct. 161, 98 L. Ed. 228; see also Cox, Labor Law Preemption Revisited (1972) 85 Harv. L. Rev. 1337, 1341-1345.)

2. In its earlier decisions, this Court struggled to apply the preemption doctrine so as to balance the need for a uniform scheme of labor relations against (1) the interest of the states in regulating some conduct which was neither protected nor prohibited by federal labor relations law (see United Automobile Workers v. Wisconsin Employment Relations Board (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. Ed. 651) and, indeed, even some conduct actually regulated by federal law, at least where the conduct was prohibited and where the remedies under state law were different from federal remedies (Weber v. Anheuser-Busch, Inc. (1955) 348 U. S. 468,

75 S. Ct. 480, 99 L. Ed. 546; United Construction Workers v. Laburnum Construction Corp. (1954) 347 U. S. 656, 74 S. Ct. 883, 89 L. Ed. 1025; cf. Garner v. Teamsters Local 776, supra, 346 U. S. 485, 74 S. Ct. 161, 98 L. Ed. 228) and (2) the right of individuals involved in the collective bargaining process to seek judicial redress for injuries which resulted from conduct lying outside the Labor Board's primary area of responsibility and for which federal law provided inadequate remedies (International Association of Machinists v. Gonzales (1958) 356 U. S. 617, 78 S. Ct. 923, 2 L. Ed. 2d 1018.)

These early efforts, while usually unexceptionable in terms of results, failed to produce a single, simple and universally applicable preemption test, and ultimately, in San Diego Building Trades Council v. Garmon (1959) 359 U. S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775, this Court essayed a much more sweeping formulation of the preemption doctrine, evidently hoping thereby to enable the lower courts to police the uneasy frontiers between federal and state power and between judicial and administrative jurisdiction without the need for constant supervision by this Court. (See Motor Coach Employees v. Lockridge (1971) 403 U. S. 274, 289-290, 91 S. Ct. 1909, 29 L. Ed. 2d 473.)

The Garmon test is indeed marvelously easy to state. Under that test, conduct actually or arguably subject to the Labor Management Relations Act -- that is, actually or arguably prohibited by Section 8 (29 U.S.C. §158) or actually or arguably protected by Section 7 (29 U.S.C. §157) --

may not be regulated by the states and lies within the exclusive jurisdiction of the Labor Board. Theoretically at least, the application of the test is marvelously simple, too. What determines whether a particular lawsuit is preempted under the Garmon principle is not the form of the action -- that is, whether it sounds in tort or in contract or whether it purports to depend on state law of general applicability instead of state law which attempts specifically to regulate labor relations --- but rather the nature of the conduct itself. If the "crux" of the lawsuit is conduct arguably subject to the Labor Management Relations Act and to the Board's jurisdiction, the courts are without power to entertain it. (Plumbers Union v. Borden (1963) 373 U. S. 690, 697-698, 83 S. Ct. 1423, 10 L. Ed. 638.)

D. Application of Principle

It is not entirely clear that the Garmon principle requires preemption in this case.

This case is unlike the usual action against a union by a member in that the misconduct complained of was not a single act but rather embraced a series of acts of varying character occurring over a period of more than two years. This fact makes it somewhat more difficult to determine where the "crux" of the action lies than in the previous cases decided by this Court, but logically, the "crux" of the action should be determined

by examination of the overall character of the misconduct rather than isolated instances.

Examination of the overall character of the Respondents' misconduct reveals that although it occurred in a setting to which the Labor Management Relations Act applied, it had as its motive personal enmity and was not an attempt either to coerce an employee in the exercise of protected rights (29 U. S. C. §158 (b)(1)(A)) or to gain an unfair or illegal advantage in collective bargaining (29 U. S. C. §158(b)(4)).

To the extent that any of the misconduct complained of does come within the ambit of the Garmon principle, it does so in a way that involves the policies underlying the principle in the most peripheral way.

In the first place, Petitioner has not sought judicial interpretation or application of the provisions of the Labor Management Relations Act, so that the Labor Board's role as a primary arbiter of issues of national labor policy is not involved here. In the second place, Petitioner has not invoked a rule of state law aimed specifically at the regulation of labor relations, so that the problem of competing schemes of labor relations law is not involved here either. Thus, any conflict that may occur will be at most indirect.

Applying the Garmon test, it is clear that the misconduct in question is by no stretch of the imagination protected under Section 7 of the Labor

Management Relations Act, since Respondents were scarcely exercising the right of employees to engage in or to refrain from collective bargaining. If it were protected or even arguably protected there would exist the risk of an immediate and direct conflict between the standards of behavior prescribed by the act and applied by the Board and the standards of behavior by which Respondents' conduct was judged herein. To countenance any such conflict would unquestionably be to undermine the Labor Board's implementation of the national labor policy and in effect to Balkanize the law of labor relations.

Since Respondents' conduct was not protected under Section 7, the Garmon rule, if it does apply, applies because their conduct violated or arguably violated Section 8(b) of the Act, which proscribes as unfair labor practices coercion and discrimination by labor organizations which is intended to encourage or discourage the exercise of protected Section 7 rights.

If conduct clearly violates Section 8, to confer concurrent jurisdiction to regulate it upon the courts cannot give rise to the kind of head-on collision which renders intolerable judicial or state regulation of conduct protected under Section 7. The conflict in such situations is nothing more than a difference in remedies available from the respective tribunals.5/

5/ Garner v. Teamsters Local 776, supra, 346 U. S. 485, 74 S. Ct. 161, 98 L. Ed. 2d 228,

(con't p. 19)

An element of complication is added if the conduct is only arguably prohibited by Section 8. The evident intent of the "arguably prohibited" portion of the Garmon test is (1) to leave to the Labor Board, with its special expertise, the exclusive power to determine whether certain borderline varieties of conduct are helpful or harmful to the objectives of the Act and thus whether they should be prohibited or not, and (2) to allow the Board to protect conduct which it might prohibit by simply not regulating it. When conduct is arguably subject to Section 8 in this sense, a proper respect for the Labor Board's primary jurisdiction necessarily precludes interference by the courts.

But there is some conduct which may be arguably prohibited by Section 8 without there being any shadow of a doubt that if it is not in

---

5/ (con't)
might seem to indicate a contrary view, but a basic concern there -- if not the basic concern -- was that if the courts as well as the Board were permitted to determine whether a particular instance of conduct was prohibited, there would exist a real danger of inconsistent adjudications, no matter how diligently the courts attempted to imitate the reasoning of the Board. (See also Cox, Labor Law Preemption Revisited (1972) 85 Harv. L. Rev. 1337, 1341-1345.) The kind of conduct referred to here is conduct as to the prohibited character of which reasonable men could not differ.

fact prohibited by the Act, it is still inimical to the Act's objectives and would be proscribed by the Board if it thought it had the power. The issue for the Board's determination in cases of this sort is whether in fact Section 8 gives it the authority to act at all, not whether (assuming the Board has the authority) it ought to act. There is in a very loose sense a conflict between the Board and a court when the court awards damages or other relief on account of conduct which the Board would prohibit if it could but which it has decided nor might decide it cannot reach. But this conflict is even more tangential and remote than the conflict in remedies which may occur when a court entertains a law suit founded upon clearly prohibited conduct.

The record herein reveals but one instance of clearly proscribed conduct, for which the Board did in fact provide a partial remedy. It reveals, additionally, a great many instances of misconduct by no means so easily characterized. To the extent that any of these remaining instances can properly be regarded as arguably subject to Section 8 there can be no question that they are arguably subject only in the second of the two senses just discussed; that is, that the only arguable issue is whether the Labor Board has the authority under Section 8 to prohibit them.

It might be added that just as the conduct in question is obviously not the kind of conduct to which Sections 7 and 8 are primarily addressed, so it is not the kind of conduct involved in Teamsters Local 20 v. Morton (1964) 377 U. S.

252, 84 S. Ct. 1253, 12 L. Ed. 2d 280. There this Court recognized that conduct clearly not subject to the Act might still lie outside the regulatory power of the states if Congress, in deliberating upon the Act, necessarily focussed on the conduct but in balancing the interests of employers, employees, unions and the public decided to leave it unregulated. Professor Archibald Cox denominates such conduct "permitted conduct" to differentiate it from conduct which the Board has the affirmative power to protect. (Cox, Labor Law Preemption Revisited (1972) 85 Harv. L. Rev. 1337; see also Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of Garmon (1972) 72 Col. L. Rev. 469, 477-478.) It can hardly be contended that Congress, if it focussed on the kind of egregious misconduct involved here, could have intended that such misconduct go unredressed.

E. Applicable Exceptions

The Garmon principle is subject to a number of exceptions.

So far as is relevant here, exceptions to the basic Garmon principle are recognized (1) where the conduct in question directly affects vital local interests traditionally left to state regulation or is only peripherally related to the central purpose of the Labor Management Relations Act (Linn v. Plant Guard Workers (1966)

383 U. S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582; Automobile Workers v. Russell (1958) 356 U. S. 634, 78 S. Ct. 932, 2 L. Ed. 2d 1030; International Association of Machinists v. Gonzales, supra, 356 U. S. 617, 78 S. Ct. 923, 2 L. Ed. 2d 1018; United Construction Workers v. Laburnum Constructors Corp., supra, 347 U. S. 656, 74 S. Ct. 833, 89 L. Ed. 1025); (2) where an employer or union has breached its duties to a worker arising from or concerning a labor agreement (29 U. S. C. §185; Smith v. Evening News Association (1962) 371 U. S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246); (3) where, without respect to any breach of a labor agreement, a union has violated its duty to fairly represent its members (Vaca v. Sipes (1967) 386 U. S. 111, 87 S. Ct. 903, 17 L. Ed. 2d 842); and (4) where a union member has been subjected to union discipline without observance of minimal procedural safeguards (29 U. S. C. §§411(a)(5), 412; Hardeman v. International Brotherhood of Boilermakers (1971)401 U. S. 233, 91 S. Ct. 609, 28 L. Ed. 10). In these situations, an action at law may be brought in a state or federal court even though the conduct in question is actually or arguably subject to the provisions of the Labor Management Relations Act and to the jurisdiction of the Labor Board.

As will be seen, the exception primarily applicable here is the first; but the others, although perhaps not directly applicable, indicate that the Congress and the courts have perceived definite limits to the necessity for avoiding all possible conflict between the Board's regulation

of labor management relations and judicial regulation of the relations between unions and their members.

1. The source of the first mentioned exception is the Garmon decision itself, this Court having there specifically exempted areas of vital local concern and areas of concern peripheral to the basic purposes of the national labor legislation from the operation of the rule. The Garmon court expressed this exception as follows:

> "... When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the State from acting. However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See International Assn. of Machinists v. Gonzales, 356 U.S. 617. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that,in the absence of compelling congressional direction,

we could not infer that Congress had deprived the State of the power to act." (359 U.S., 243-244.)

The primary application of this exception has been to situations involving actual or threatened public disorder (see Russell and Laburnum, supra), to disputes characterized as involving purely internal union affairs (see Gonzales), and to actions for libel occuring in the course of certification campaigns (see Linn, supra), but there is nothing in the cases to suggest that these were ever meant to be the only matters encompassed within the exception.

Indeed, much of this Court's discussion in the Linn case is of obvious general applicability, and in Linn may be discerned the outlines of a test for determining whether any tort claim arising under state law is preempted or not: If (a) the conduct in question does not ipso facto constitute an unfair labor practice (383 U. S., at p. 63), (b) the conduct affects compelling local interests (393 U. S., at pp. 63-64), (c) the National Labor Relations Board and the courts are concerned with separate and severable consequences of the conduct and the remedies they provide are mutually exclusive (383 U. S., at pp. 63-64), and (d) the conduct in question was motivated by actual malice and caused actual damage (383 U. S., at pp. 64-66), a tort action will lie, notwithstanding an incidental violation of the Labor Management Relations Act.

That test is more than satisfied here. The conduct involved here is not automatically an unfair labor practice; in fact, much of it is clearly not, and only a small part of it, if any, is even arguably an unfair labor practice. That California is vitally interested in the protection of its citizens -- including its workmen -- from the intentional infliction of emotional distress is manifested by the California Supreme Court's decision in Alcorn v. Anbro Engineering, Inc. (1970) 2 Cal. 3d 493, 86 Cal. Rptr. 88, 468 P. 2d 216, a case which arose in a labor context and which far more arguably involved an unfair labor practice than does this case. (See 29 U. S. C. §§158(a)(1) and (3).) The Labor Management Relations Act is essentially unconcerned with the impact of such misconduct upon the individual, or with conduct undertaken from motives unrelated to the bargaining process. This is apparent from its failure to provide any remedy whatever for the kind of harm done the individual by such misconduct, the Labor Board having the power at most to award lost wages to a worker who suffers mistreatment at the hands of his union. California's law of torts requires outrageous conduct and grievous emotional distress to be shown to establish the tort here in question, a burden considerably heavier than the showing of mere actual malice or actual damage required under Linn (383 U. S. at pp. 64-66).

As already noted, also included within Garmon's exemption of matters of peripheral federal concern are disputes involving purely internal union affairs. The primary example of

this branch of the exception is International Association of Machinists v. Gonzales, supra, in which a member's action in state court for damages (including damages for physical and mental suffering) and for reinstatement following expulsion from his union was held not preempted by the Labor Management Relations Act. Petitioner submits that the bulk of the misconduct in this case falls squarely within this branch of the exception.

Respondents argued below, however, and the Court of Appeal was persuaded, that Petitioner's cause of action for infliction of emotional distress was governed by Motor Coach Employees v. Lockridge, supra, 403 U. S. 274, 91 S. Ct. 1909, 29 L. Ed. 2d 473, Plumbers Union v. Borden, supra, 373 U. S. 690, 83 S. Ct. 1423, 10 L. Ed. 2d 638, and Iron Workers Union v. Perko (1963) 373 U. S. 701, 83 S. Ct. 1429, 10 L. Ed. 2d 646, rather than by this exception. In Perko, Borden, and Lockridge, the acts complained of involved direct interference with existing employment relations or with employment relations about to be entered into. In Lockridge, this Court pin-pointed such active interference as the feature which distinguished Lockridge, Borden and Perko from Gonzales. (403 U. S., at pp. 295-296.)[6/] Respondents (App. Op. Br.,

---

6/ To what extent Borden, Perko and Lockridge have impaired the vitality of Gonzales, one can only conjecture. (See dissenting opinions of

(con't. p. 27)

pp. 34-44) and the Court of Appeal (Appendix A, pp. 21-24) reasoned that since one of the many instances of misconduct herein was the Union's refusal to dispatch Petitioner in response to an employer request, and since a large portion of the remaining instances of misconduct involved hiring hall discrimination, this case was indistinguishable from Borden, Perko and Lockridge.

6/ (con't)
Justices Douglas and White in Lockridge, 403 U. S., at 308 et seq.; Cox, Labor Law Preemption Revisited (1972) 85 Harv. L. Rev. 1337, 1375-1376; Note, Preemption of the Nonviolent Torts in the Labor Field: Formulation of Standards in the Supreme Court and in State Courts (1968) 48 Bost. Ul. L. Rev. 83, 94 et seq.) On one hand, Borden, Perko and Lockridge might be read as confining Gonzales actions to those for reinstatement only, with even incidental awards of back pay precluded. On the other hand, Borden, Perko and Lockridge may stand for the more limited proposition that only where the "crux" of the action is interference with employment relations, rather than status in the union, is Gonzales inapplicable. Logically it would seem that if the subject matter of the action is in fact of peripheral federal concern, the policy of avoiding multiple proceedings would favor an action for all appropriate relief, even if legal and administrative remedies to some extent overlapped.

It is not altogether clear why such talismanic significance should be attached to the distinction between misconduct which interferes with the employment relation and misconduct which does not. A union may as easily restrain or coerce a member in the exercise of protected rights without at all affecting his employment status as by tampering with his job rights or by causing the member's employer to coerce him, and the former variety of coercion is no less illegal than the latter (29 U.S.C. §§158(a)(1)) (A), 158(b)(2).)

In any event, nothing in Borden, Perko or Lockridge justifies extending the purported principle that interference with existing or prospective employment removes a case from the operation of Gonzales to cases touching on employment or the hiring hall in only the most remote or tangential way. Two of the mentioned cases (Perko and Lockridge) involved a single act directly affecting a job already possessed by the employee involved, and one (Borden) involved a single refusal to refer a union member to a job actually promised to him. It was this easy in those cases to characterize the "crux" of the action as interference with actual or prospective employment relations, an arguable violation of Section 8(b)(1)(A) or 8(b)(2). Here, by contrast, only one instance of misconduct concerned actual or promised employment and that instance constituted but a small or incidental part of a much larger pattern of oppression. Continuing refusal to dispatch Hill from the hiring hall formed a considerably greater part of the vindictive

campaign to drive Hill from the Union. That misconduct obviously did not involve actual or existing employment and it cannot be said to involve even prospective employment in anything like the sense that Borden did. Rather, the overall effect of the Respondents' hiring hall abuses was more nearly akin to outright expulsion from the union, bringing the case within Gonzales.

Moreover, the Borden, Lockridge and Perko decisions are distinguishable on a further basis. Each involved, in addition to actual interference with employment relations, an issue which might be regarded as particularly within the expertise of the National Labor Relations Board. In Lockridge, where the member involved was expelled from his union for nonpayment of dues and was thereafter fired from his job under a union security clause in the labor agreement between his union and his employer, the issue was the construction of the union security clause, a matter within the jurisdiction of the Board under Sections 8(a)(3) and 8(b)(2) of the Labor Management Relations Act (29 U. S. C. §§158(a)(3), 158(b)(2)). (See, however, Cox, Labor Law Preemption Revisited (1972) 85 Harv. L. Rev. 1337, 1370-1371, 1376.) In Perko, the further issue was whether the supervisory employee the union caused to be fired was an "employee" within the meaning of Section 2(3) of the Labor-Management Relations Act (29 U. S. C. §152(3)). In Borden, the additional factor was that the member involved appeared to have breached a union rule against soliciting jobs from prospective employers instead of awaiting

job referrals from the union hall. Arguably at issue was whether that rule was or was not consonant with national labor policy as expressed in Sections 7 and 8 of the Act. Here, by contrast, there were no such additional issues.

2. The three causes of action to which Respondents' demurrer was sustained in the trial court were attempts to invoke some of the other exceptions set out above. Those causes of action and the various other exceptions are not before this Court in any direct sense, but the other exceptions do merit consideration here because they illustrate to what extent the courts, applying other bodies of law, have been permitted to encroach upon the supposedly sacrosanct domain of the Board and the Labor Management Relations Act, and thus by implication what kinds of conduct have been determined to be of only peripheral concern to the scheme of labor relations regulation embodied in the Act. Petitioner therefore submits that whatever the form in which his action is cast, if the misconduct complained of falls within one or more of these other exceptions, his action ought not to be deemed preempted.

a. The concept of a union's duty to fairly represent its members is a broad one. It is in essence the responsibility of a union selected as a bargaining agent by employees to discharge its agency by representing the interests

of each employee fairly and making a genuine effort to serve the interests of all its members, without hostility and in complete good faith and honesty. (Humphrey v. Moore (1964) 375 U. S. 335, 342, 84 S. Ct. 363, 11 L. Ed. 2d 370; Ford Motor Co. v. Hoffman (1952) 345 U. S. 330, 337-338, 73 S. Ct. 681, 97 L. Ed. 1048.)

The issue of breach of the duty of fair representation may arise either in the context of a suit under Section 301 of the Labor Management Relations Act (29 U. S. C. §185) for breach of a labor agreement (Vaca v. Sipes, supra, 386 U. S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842; Richardson v. Communications Workers of America (8th Cir. 1971) 443 F. 2d 974) or in a suit involving no such contractual breach (Vaca v. Sipes, supra, as characterized in Motor Coach Employees v. Lockridge, supra, 403 U. S. 274, 299, 91 S. Ct. 1909, 29 L. Ed. 2d 473; Smith v. Sheet Metal Workers (5th Cir., 1974) ___F. 2d___, 87 LRRM 2211; Retana v. Apartment, Motel, etc. (9th Cir. 1972) 453 F. 2d 1018). Such actions for breach of the duty of fair representation lie outside the scope of the preemption doctrine and may be brought in either state or federal courts. (Arnold v. Carpenters' District Council (1974) 417 U. S. 12, 40 L. Ed. 2d 620, 94 S. Ct. 2069; Vaca v. Sipes, supra, 386 U. S. at pp. 181-187.)

Here, Section 204.1 of the Master Labor Agreement between the District Council and the involved employers provided for "open and non-discriminatory employment lists for the use of

workmen desiring employment on work covered by this Agreement" [Exhibit 32]. A Section 301 action would therefore clearly lie. Moreover, breach of the Master Agreement to the side, there can be no question that Respondents' hostile, malicious and abusive conduct toward Petitioner fell far below the standard of fair, honest, good faith and impartial treatment Petitioner deserved at Respondents' hands.

b. Under Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U. S. C. §411) (a)(5), a union member may not be disciplined by his union without first being served with written specific charges, given a reasonable time to prepare his defense and afforded a full and fair hearing. Under Section 102 of the Act (29 U. S. C. §412), a union member who is disciplined in disregard of Section 101(a)(5) may sue his union. Such actions are exempted from the Garmon rule. (Hardeman v. International Brotherhood of Boilermakers (1971) 401 U. S. 233, 28 L. Ed. 2d 10, 91 S. Ct. 609.)

It is more than merely arguable that the campaign of harrassment, intimidation and referral discrimination pursued by business agent Daley and others under his control was a form of informal discipline imposed on Petitioner for his failure to fall in line with Daley and his policies. Indeed, the thrust of much of the defense offered by Respondents at trial was that their outrageous conduct toward Petitioner was justified because Petitioner was making matters

very difficult for Daley and his friends, and because he sometimes caused trouble on the jobs to which he was dispatched. There is no evidence in the record of any attempt whatever to satisfy the procedural standards set out in Section 101(a)(5).

F. Reexamination of Garmon

No one who has had to struggle with the preemption doctrine as it has developed in the area of labor relations law can avoid concluding that the Garmon principle, for all its claimed simplicity and universality, suffers serious failings as a rule of law, failings which have led to widespread criticism of the principle. (See e. g. Cox, Labor Law Preemption Revisited (1972) 85 Harv. L. Rev. 1337; Bryson, A Matter of Wooden Logic: Labor Law Preemption and Individual Rights (1973) 51 Tex. L. Rev. 1037; Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of Gorman (1972) 72 Col. L. Rev. 469; Hooton, The Exceptional Garmon Doctrine (1975) 26 Lab. Law J. 49; Note, Preemption of State Labor Regulations Collaterally in Conflict with the National Labor Relations Act (1968) 37 G. Wash. L. Rev. 132; Michelman, State Power to Govern Concerted Employee Activities (1961) 74 Harv. L. Rev. 641.

In the kind of situation presented by the Garmon case (which involved an award of damages

to an employer by a state court under state tort law for a union's use of arguably protected economic weapons in a collective bargaining dispute with the employer), the Garmon principle is indeed easy to apply and produces an unquestionably proper result.

But when the Garmon principle has been applied to fundamentally different situations, involving not the relationship between employer and union, but the relationship between union and union member (see Lockridge, Borden and Perko) it has tended to yield results which are difficult to justify in terms of fundamental fairness (the Labor Board has unreviewable discretion to refuse even a clear case, and if it does, the individual is wholly without a remedy) and results which are only marginally promotive of the purposes of the preemption doctrine (state regulation of conduct largely unrelated to employee self-organization and collective bargaining scarcely hampers implementation of the national labor policy).

In addition, the Garmon principle has lost much of its original simplicity, in part because of the development, already adverted to, of a number of judicial and legislative exceptions to the basic principle (see dissenting opinion of Mr. Justice White in Motor Coach Employees v. Lockridge, supra, 403 U. S. at 309; Bryson, A Matter of Wooden Logic: Labor Law Preemption and individual Rights (1973) 51 Tex. L. Rev. 1037, 1040-1041; Hooton, The Exceptional Garmon Doctrine (1975) Lab. L. J. 49) and in

part because of the valiant but largely unsuccessful attempts of this Court to square some of the later cases (see Borden, Perko and Lockridge, supra) with the pre-Garmon decisions (see Gonzales, Laburnum and Russell, supra), which embodied different and probably irreconcilable concepts of preemption, but which the Court was nonetheless unwilling to overrule.

And finally, the most attractive of the claimed attributes of Garmon -- that its ostensibly simple formula provides a rule of decision for all cases -- has been exposed as illusory by this Court's decision in Teamsters Local 20 v. Morton, supra, 377 U. S. 252, 84 S. Ct. 1253, 12 L. Ed. 2d 280. Under Morton, it will be recalled, conduct which is clearly neither protected nor prohibited by the Act may still be foreclosed to regulation by the states if Congress focussed on such conduct but declined to prohibit it, at least where leaving such conduct unregulated was part of the balance Congress struck between the conflicting interests of unions, employers, employees and the public.

In an excellent recent review of the doctrine of preemption as it has developed in the area of labor relations law, Professor Archibald Cox has suggested that a far more satisfactory way of analyzing and resolving preemption issues than the Garmon principle is the principle enunciated in Morton. (Cox, Labor Law Preemption Revisited (1972) 85 Harv. L. Rev. 1337.)

Professor Cox argues that since the national labor legislation was enacted against a backdrop of local laws creating rights of property, bodily security and personality and preserving public order, health and welfare -- laws which apply to everyone regardless of his involvement or non-involvement in collective bargaining -- the relevant inquiry where a rule of local law is invoked in a dispute arising in the collective bargaining context is not whether such rule might impinge indirectly on the federal scheme of labor relations regulations. Rather, the question is whether (assuming always that the conduct under scrutiny is not actually protected) the local law or rule of decision is based upon an accomodation of the special interests of employers, unions, employees and the public in the collective bargaining process, an accommodation of the sort already made by the Congress in enacting the Labor Management Relations Act. Professor Cox would bar state regulation where the state seeks to reach its own resolution of such conflicting interests, but not otherwise. (Cox, op. cit., pp. 1356-1357.)

Under the Morton approach, Professor Cox points out, Lockridge (although perhaps not Borden and Perko)7/ should have been decided

---

7/
Cox believes the ability of the Board to provide a substantially adequate remedy in Borden and Perko warrants continuing adherence to the results there reached. (Cox, op. cit., p. 1376,
(con't p. 36)

differently. In Cox's view, a dispute between a union member and his union lies largely outside the basic focus of the Labor Management Relations Act, and even if there is some slight possibility of a different result if such a dispute is heard by a court instead of the Board, or some difference between the remedies available from a court and those available from the Board, there will seldom be any noticeable effect on the balance of power between employer and union. Such possibilities of conflict or inconsistency as may arise are to Professor Cox preferable to complete denial of any remedy (as occurs when the courts are precluded by Garmon from acting and the Board declines to act), as well as to the need for dual proceedings in cases where a union member fired from his job because of wrongful expulsion from his union must seek back pay from the Board but can obtain reinstatement in the union only through a lawsuit (an inevitable consequence of Lockridge). (Cox, op. cit., pp. 1368 et seq.)

Professor Cox's analysis is compelling. His proposal to expand the Morton principle preserves for Board regulation precisely that sphere of activity Congress intended the Board

---

7/ (con't)
Here, of course, the Board is utterly without power to award compensation for the harm suffered, just as in Lockridge it was without the power to cause the expelled member's reinstatement in his union.

to oversee, but it largely eliminates the egregious injustice which results when the Board is not empowered to provide an adequate remedy or when the Board declines jurisdiction of a case which the courts are precluded from touching because the Board arguably might act if it wished. And because it encompasses not only union-employer but union-member disputes, it provides a test comprehensive enough to properly resolve all preemption cases, as the Garmon rule cannot.

Obviously, if Lockridge was wrongly decided under Professor Cox's Morton approach, so too was this case. Indeed, the possibility of any significant conflict between the enforcement of California's law of torts and the effectuation of a unitary national labor policy is even more remote here than the largely imaginary conflict in Lockridge, there being nothing in this case which requires the expertise of the Labor Board.

CONCLUSION

The fundamental issue in this case is whether, by reason of an unnecessarily hypertechnical application, the doctrine of preemption is to be allowed to become the primary refuge of any labor official who wishes to behave like a scoundrel. Conduct whose main purpose is to harm and injure another, as was Business Agent Daley's, is by no stretch of the imagination protected by national labor policy. To the extent that such conduct is prohibited by the Labor Management Relations Act, the Act's limited concern is its adverse impact on the maintenance of industrial peace through collective bargaining, rather than its effect upon the immediate victim. This limited concern is reflected in the very limited remedial powers afforded the National Labor Relations Board. Personal vendettas, even those which have their genesis in labor disputes and which may be pursued in an industrial setting, are outside the purview of the Labor Management Relations Act and certainly outside the special expertise of the Board. As this case itself illustrates, such vendettas, fueled as they are by passions which go far beyond the largely economic motivations assumed by the Act, are scarcely likely to be deterred by the pin-prick remedial measures available to the Board, measures which are only minimally adequate for their primary intended purpose and largely inadequate to make whole the hapless victims of the kind of outrageous misconduct involved here.

Viewed from a practical standpoint, the possibility of any real conflict between the accomplishment of the objectives of the Act and the effectuation of the policies underlying California's law of torts is remote indeed, and the process of employee self-organization and collective bargaining would be entirely unaffected by the affirmance of the judgment herein. To sacrifice the substantial interests of Petitioner, and those situated as he is, in order to avoid so insubstantial and hypothetical a conflict would be a gross injustice indeed.

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal.

Respectfully submitted,

G. DANA HOBART
GERALD KANE

Attorneys for Petitioner

APPENDIX

APPENDIX A

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RICHARD T. HILL,	)	
	)	2nd Civ. No.
Plaintiff and	)	43751
Respondent,	)	
	)	Sup. Crt. No.
vs.	)	951866
	)	
UNITED BROTHERHOOD	)	Court of Appeal
OF CARPENTERS AND	)	Second District
JOINERS OF AMERICA,	)	
LOCAL 25, et al.,	)	FILED
	)	Jun 30 1975
Defendants and	)	Clerk
Appellants.	)	
	)	Dpty. Clrk.

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert W. Kenny, Judge. Reversed.

Geffner & Satzman, Howard Rosen and Leo Geffner, for Defendants and Appellants.

Coleman, Silverstein & Hobart, for Plaintiff and Respondent.

Charles P. Scully and Donald C. Carroll, attorneys for Amicus Curiae California Labor Federation, AFL-CIO.

Van Bourg, Allen Weinberg, Williams & Roger, Victor J. Van Bourg and David A. Rosenfeld, attorneys for Amicus Curiae.

Richard T. Hill (Hill) filed a first amended complaint for damages against United Brotherhood of Carpenters and Joiners of America, Local 25, an unincorporated association (Local 25), the Los Angeles County District Council of Carpenters, an unincorporated association (Council), United Brotherhood of Carpenters and Joiners of America, AFL-CIO, 1/ an unincorporated association (United Brotherhood), Earl George Daley (Daley), Benjamin Fenwick (Fenwick), Joseph Wilk (Wilk), James Keene (Keene) and Kenneth Scott (Scott). The amended complaint contained four causes of action; the court sustained demurrers without leave to amend as to Counts I, III and IV and overruled the demurrer to Count II. 2/

1/ We substitute the name under wich the defendant appeared.

2/ Since Hill does not appeal from the judgment we will treat the legal problems as if only cause of action II had been filed.

After answer, the case was tried by a jury. The court dismissed the action as to Keene. Hill Voluntarily dismissed as to Scott and United Brotherhood. The jury returned a verdict in favor of Hill for $7,500 actual damages and $175,000 exemplary damages against Local 25, Council, and Daley and a verdict in favor of Fenwick and Wilk. Local 25, council and Daley appeal from the judgment.

CONTENTIONS

Appellants contend:

I. The superior court did not have jurisdiction where the alleged tort of intentionally inflicting emotional distress arose out of and as the result of alleged acts of discrimination in the hiring and dispatching policies and conduct by Local 25 inasmuch as that subject matter is pre-empted by the National Labor Relations Act.3/

3/ For sake of brevity and simplicity we have reworded and compressed appellants' argument into one sentence. As originally stated by appellant, this one point contains eight subdivisions and aggregates one and a half pages of headings. In addition, appellants (apparently out of an abundance of caution) urge eight additional grounds for reversal aggregating two and one half additional pages of headings. These

(con't p. A-4)

FACTS

The amended complaint alleged: that Local 25 was an unincorporated association affiliated with Council and United Brotherhood "possessing and asserting jurisdiction over members of these organizations, that Local 25 is affiliated to the other organizations and is chartered by them and derives its power, duties and jurisdiction from each of them," that defendants "were and now are engaged in the business of being a labor union, or employees of a labor union," that each defendant was the "agent and employee of each of the remaining defendants and was at all times acting within the purpose and scope of such agency and employment," that Hill was a member in good standing of each of the organizations. The critical paragraph (13) of the second cause of action reads:

3/ (con't) claims of alleged error relate to the conduct of the trial and they type of damages awarded. Since we conclude that the jurisdictional point is dispositive of this appeal and that reversal is mandated by federal law, we deem it inappropriate and unnecessary to attempt to match the scholarly effort of the parties and amicus curiae whose briefs aggregate almost 300 pages.

"During the aforesaid period Defendants, and each of them, made repeated oral threats to Plaintiff to the effect that as long as they controlled the job-dispatching procedures that Plaintiff would be and he was given inferior assignments and be by-passed for work assignments. During the same period, as aforesaid, Defendants, and each of them, repeatedly threatened Plaintiff with actual or defacto expulsion from the union in retaliation for his political activities, and further threatened to deprieve [sic] Plaintiff of his ability to earn a living as a carpenter.

"Defendants, and each of them, knew or reasonably should have known or expected that their outrageous conduct, threats, intimidation, and words would result in severe emotional, mental and physical damage to Plaintiff."

The second cause of action further alleged that as a proximate result "of the intentional and wrongful discriminatory conduct practiced by Defendants and each of them as aforesaid Plaintiff has suffered a nervous breakdown, grievous mental anguish and bodily injury making him sick, sore and lame"; (emphasis ours) to his general damage in the sum of $500,000. The complaint also alleged "all of the aforesaid acts, conduct and discrimination by Defendants, and each of them was done deliberately and maliciously" (emphasis ours) for which Hill sought an additional $500,000 as punitive damages.

At trial, Hill produced evidence from which the jury could conclude that Daley was business agent of Local 25, that Daley dispatched members of Local 25 to job sites on work assignments, that Hill was vice president of Local 25 during the period 1955-1968, that he had certain disputes and disagreements with Daley, that in January 1967, while he (Hill) was unemployed and on the out of work assignment list of Local 25, he was by-passed in assignment, that he complained to Daley and was told to go complain to Council, that he was a "jerk, knothead, idiot" and that he should go to another Local union, that he had other disputes with Daley concerning a credit union established by Local 25 and expenses incurred by Daley, that Daley dispatched other carpenters to work assignments ahead of him and he complained to Daley on the dispatching procedures, that Daley told him he would sit on the bench until "hell freezes over." Hill testified that other Union officials (Wilk and Fenwick) treated him the same way, that he told Daley he would file with the National Labor Relations Board (N.L.R.B.). Hill produced evidence that certain job site employers requested that he (Hill) be assigned to their jobs, but Local 25 assigned other Union members.

Hill testified that he filed charges with Council about Daley's dispatching procedures but that the Executive Board of Council dismissed the charges. Hill admitted that he was given some work assignments but he was also given other assignments where the work was non-existent. On other assignments the type of work was

unsatisfactory and he refused to accept it.

Hill testified that he ran for the office of President of Local 25 on the ground that Daley was a drunken fool, a disgrace to the Union and corrupt and that he was discriminating in running the hiring hall. Hill testified that in 1967 he filed a charge with the N.L.R.B. on the Dinwiddy-Simpson construction job (Crocker Citizens Bank Building), alleging discriminatory assignment and that in November 1968, the N.L.R.B. found that there had been discrimination and the notice of discrimination from the N.L.R.B. which the N.L.R.B. required be posted "in a conspicuous place for 60 days" was buried by Daley on the window of one of the inner offices where nobody would see it.

Hill testifi[illegible] that he and Daley never engaged in any fight o[illegible] struck any blows but that on one occasion Daley invited him to "go out in the street and fight." The invitation was apparently not accepted. Hill called Daley as an adverse witness and examined him at great length as to his work assignment practices.

Hill also produced evidence that Daley prevented him from performing his official duties as vice president of the Union, that Daley would not let him preside in the absence of the President because Daley claimed that he (Hill) was inadequate, that Daley ridiculed him and insulted him before other Union members, that Daley urged him to leave the Union, that Daley threatened him, that Daley threatened to starve

him by refusing work assignments, that Daley fabricated a dispatch slip in order to place Hill's name at the bottom of the out-of-work list from which assignments were made, that Daley interfered with his unemployment insurance benefits by telling the state agency that Hill had refused work assignments, that Daley would assign him to jobs which he was not qualified for and "just can't handle" which was contrary to Union rules and regulations which allowed members to calssify themselves regarding their work capabilities, that Daley refused to honor employers' specific request for Hill, that he was threatened and intimidated because he filed char with the N.L.R.B., that an agent of Council told 250 union members ". . . a brother ran down to the [N.L.R.B.] and there's no brother going to extract money from this Union and stay in it," that Daley dispatched him to short jobs only -- the Ruane Job, 35 hours; the Burke Job, 0 hours; the Weymouth-Crowell Job, 2 days; the Spear Job, 2 days -- during which period there were 108 job opportunities on which other members were assigned, that Daley fabricated a dispatch of Hill to the Steel Form Company job which Hill allegedly refused, when in reality Hill received no such assignment. This was done in order to place Hill's name at the bottom of the job assignment list.

Hill claims that the totality of this evidence "constitutes an intentional infliction of severe emotional distress." Hill produced medical evidence regarding his alleged damages.

The defendants produced substantial evidence that employers did not request or want Hill on various jobs, that Hill had refused to work on various jobs, that Hill talked too much on the job, that he interfered with the work on various jobs, that Hill called Daley a drunken bum and then the two often drank and played poker together.

Wilk testified that he frequently drank with Hill and Daley, that he offered Hill various work assignments which Hill refused, that Hill called him a "dumb Polack" and would blow smoke in his face.

DISCUSSION

Despite the multiplicity of arguments for reversal presented by appellants, we conclude, as indicated, that one argument is basic and controlling -- that the federal government has preempted this field and the state courts have no jurisdiction, that jurisdiction to right the alleged wrong is vested in the N.L.R.B. We regard four cases as controlling -- San Diego Building Trades Council v. Garmon, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773; Local 100 v. Borden, 373 U.S. 690, 83 S. Ct. 1423, 10 L. Ed. 2d 638; Iron Workers Union v. Perko, 373 U.S. 701, 83 S. Ct. 1429, 10 L. Ed. 2d 646; and Motor Coach Employees v. Lockridge, 403 U.S. 274, 91 S. Ct. 1909, 29 L. Ed. 2d 473.

In San Diego Building Trades Council v. Garmon, supra, the Supreme Court reversed a

judgment of a state court awarding damages against a labor union allegedly sustained as the result of picketing by a labor union in the course of a labor dispute. In reversing judgment the Supreme Court said (at pp. 244-245):

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Re Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. [Fn. omitted.] Regardless of the mode adopted, to allow the States to control which is the subject of national regulation would create potential frustration of national purpose.

"At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power. State jurisdiction

too must yield to the exclusive primary competence of the Board. See, e.g., Garner v. Teamsters C. & H. Local Union, 346 US 485, especially at 489-491, 98 L ed 228, 238-240, 74 S Ct 161; Weber v. Anheuser-Busch, Inc. 348 US 468, 99 L ed 546, 75 S Ct 480.

"The case before us is such a case. The adjudication in California has throughout been based on the assumption that the behavior of the petitioning unions constituted an unfair labor practice. This conclusion was derived by the California courts from the facts as well as from their view of the Act. It is not for us to decide whether the National Labor Relations Board would have, or should have, decided these questions in the same manner. When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Ibid.

"To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. . . ."

In Garmon the N.L.R.B. had declined jurisdiction.

In Local 100 v. Borden, supra, Borden, a member of a Louisiana Local Plumbers' Union, attempted to secure a job with the Farwell Construction Company in Dallas, Texas. The business agent of the Dallas local refused to assign Borden to the job even though the foreman on the job had requested Borden. The business agent of the Dallas local refused to assign Borden apparently because Borden had procured the job himself and "he soved his [Union] card down our throat." Borden filed an action for damages in the Texas state courts, alleging that the actions of the defendants "constituted a wilful, malicious and discriminatory interference with his right to contract." (Emphasis ours.) Local 100 challenged the jurisdiction of the state courts, alleging that the N.L.R.B. had exclusive jurisdiction. The trial court upheld the claim but the Texas Court of Civil Appeals reversed and remanded for trial. The Texas Supreme Court affirmed the remand on another point. On trial the jury made an award of $1916 for actual damages, $1500 for "mental suffering and $5000 for punitive damages." The trial court disallowed the award for mental suffering and remitted punitive damages in excess of $1916 -- the amount of the actual damages as found by the jury. The Texas Court of Civil Appeals affirmed and the Supreme Court of Texas denied a writ of error. The United States Supreme Court granted certiorari and reversed. The United States Supreme Court said in part (at pp. 693-696):

"This Court held in San Diego Bldg. Trades Council v. Garmon, 359 US 236, 3 L ed

2d 775, 79 S.Ct 236, that in the absence of an overriding state interest such as that involved in the maintenance of domestic peace, state courts must defer to the exclusive competence of the National Labor Relations Board in cases in which the activity that is the subject matter of the litigation is arguably subject to the protections of § 7 or the prohibitions of § 8 of the National Labor Relations Act. [Fn. omitted.] This relinquishment of state jurisdiction, the Court stated, is essential 'if the danger of state interference with national policy is to be averted.' 359 US, at 245, and is as necessary in a suit for damages as in a suit seeking equitable relief. Thus the first inquiry, in any case in which a claim of federal preemption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance. [Emphasis ours.]

"In the present case, respondent contends that no such assertion can be made, but we disagree. [Fn. omitted.] The facts as alleged in the complaint, and as found by the jury, are that the Dallas union business agent, with the ultimate approval of the local union itself, refused to refer the respondent to a particular job for which he had been sought, and that this refusal resulted in an inability to obtain the employment. Notwithstanding the state court's contrary view, if it is assumed that the refusal and the resulting inability to obtain employment were in some way based on respondent's actual or believed failure to comply with internal rules, it is certainly "arguable" that the union's conduct violated

§ 8 (b) (1) (A), by restraining or coercing Borden in the exercise of his protected right to refrain from observing those rules, and § 8 (b) (2), by causing an employer to discriminate against Borden in violation of § 8 (a) (3). . . .

"It may also be reasonably contended that after inquiry into the facts, the Board might have found that the union conduct in question was not an unfair labor practice but rather was protected concerted activity within the meaning of § 7. This Court has held that hiring-hall practices do not necessarily violate the provisions of federal law, International Brotherhood of T. C. W. & H. v. NLRB, 365 US 667, 6 L ed 2d 11, 81 S Ct 835, and the Board's appraisal of the conflicting testimony might have led it to conclude that the refusal to refer was due only to the respondent's efforts to circumvent a lawful hiring-hall arrangement rather than to his engaging in protected activities. The problems inherent in the operation of union hiring halls are difficult and complex, see Rothman, The development and Current Status of the Law Pertaining to Hiring Hall Arrangements, 48 Va L Rev 871, and point up the importance of limiting initial competence to adjudicate such matters to a single expert federal agency."

"We need not and should not now consider whether the petitioner's activity in this case was federally protected or prohibited, on any of the theories suggested above or on some different basis. [Fn. omitted.] It is sufficient for present purposes to find, as we do, that it is reasonably 'arguable' that the matter comes within the

Board's jurisdiction." (Emphasis ours.)

The court then distinguished Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L. Ed. 2d 1018, which involved a state action for restoration to union membership where there had been an allegedly unlawful expulsion. The court then said (at pp. 697-698):

"The suit involved here was focused principally, if not entirely, on the union's actions with respect to Borden's efforts to obtain employment. No specific equitable relief was sought directed to Borden's status in the union, and thus there was no state remedy to 'fill out' by permitting the award of consequential damages. The 'crux' of the action (Gonzales, 356 US, at 618) concerned Borden's employment relations and involved conduct arguably subject to the Board's jurisdiction.

"Nor do we regard it as significant that Borden's complaint against the union sounded in contract as well as in tort. It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction. Rather, as stated in Garmon, supra (359 US at 246), '[o]ur concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered.' (Emphasis added.)

"In the present case the conduct on which the suit is centered, whether described in terms

of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards." (Emphasis ours.)

In Ironworkers Union v. Perko (decided on the same date), supra, Perko (a union member) sued the Union and certain of its officials at common law in Ohio State Courts, seeking damages because the defendants had allegedly entered into a conspiracy to deprive Perko of his right to work as a foreman. Perko alleged that defendants had induced employees to discharge Perko and that defendants had prevented him from obtaining work. The trial court dismissed and the Ohio Supreme Court reversed. The United States Supreme Court said that the Ohio Supreme Court said:

"'Plaintiff is not attempting to secure any redress for loss of rights as a member of the union. . . . He is alleging that the union to which he belonged and certain named officials thereof committed a common-law tort against him by conspiring to deprive him of his right to earn a living and interfering with his contract of employment. . . .'" (Emphasis ours.)

The Supreme Court of the United States also characterized the decision of the Ohio Supreme Court as follows (at p. 703):

"In answer to the union's argument that federal law precluded the exercise of state jurisdiction, the court stated that there was no federal preemption with regard to a state action 'to

recover damages for a common-law tort, which is also an unfair labor practice,' citing International Asso. of Machinists v. Gonzales, 356 US 617, 2 L ed 2d 1018, 78 S Ct 923."

The case was tried. The trial court instructed the jury to return a verdict for the defendants which was reversed on appeal by the Ohio courts and the case was finally retried by a jury resulting in a verdict for $25,000 for Perko which was affirmed by the Ohio Court of Appeals. The U.S. Supreme Court granted certiorari to consider the defendant's claim that the state courts lacked jurisdiction by virtue of the National Labor Relations Act. The U.S. Supreme Court said:

"As in Borden, the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations and was not directed to internal union matters. Indeed the state court itself observed that 'Plaintiff is not attempting to secure any redress for loss of rights as a member of the union.' supra, p. 648. Thus there was no permissible state remedy to which the award of consequential damages for loss of earnings might be subordinated."

The U.S. Supreme Court then considered the question whether or not the fact that Perko was a "foreman" compelled a result different from Borden. Among other elements the court concluded that Perko might still be considered by the N.L.R.B. as an employee (not as a

supervisor) and even if he was a supervisor the union could be guilty of an unfair labor practice against a supervisor. The Supreme Court concluded:

"We do not of course intimate any view on the merits of any of the underlying substantive questions, that is, whether the union was guilty of a violation of the Act. It is enough to hold, as we do, that it is plain on a number of scores that the subject matter of this lawsuit 'arguably' comes within the Board's jurisdiction to deal with unfair labor practices. We therefore conclude that the State must yield jurisdiction and the judgment below must be

Reversed."

We conclude from the foregoing that if the union conduct complained of "'arguably' comes within the Board's [N.L.R.B.] jurisdiction to deal with unfair labor practices" then state jurisdiction is preempted and the N.L.R.B. has exclusive jurisdiction.

An additional and later case which supports this conclusion is Motor Coach Employees v. Lockridge, supra, wherein Lockridge recovered damages in a state court (Idaho) action for allegedly nonpayment of union dues. Lockridge alleged that the defendants "acted wantonly, wilfully and wrongfully and without just cause . . . and plaintiff has been harassed and subject to mental anguish." (Emphasis ours.) The U.S. Supreme Court granted certiorari. It characterized the Garmon case as follows:

"San Diego Building Trades Council v. Garmon, 359 US 236, 3 L Ed 2d 775, 79 S Ct 773 (1959), established the general principle that the National Labor Relations Act pre-empts state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act. That decision represents the watershed in this Court's continuing effort to mark the extent to which the maintenance of a general federal law of labor relations combined with a centralized administrative agency to implement its provisions necessarily supplants the operation of the more traditional legal processes in this field. We granted certiorari in this case, 397 US 1006, 25 L Ed 2d 419, 90 S Ct 1232 (1970), because the divided decision of the Idaho Supreme Court demonstrated the need for this Court to provide a fuller explication of the premises upon which Garmon rests and to consider the extent to which that decision must be taken to have modified or superseded this Court's earlier efforts to treat with the knotty pre-emption problem." (Emphasis ours.) (At p. 276.)

The Supreme Court referred to section 8 of the National Labor Relations Act and various subdivisions thereof which make it an unfair labor practice to encourage or discourage union membership. The court said:

" Further, in San Diego Building Trades Council v. Garmon, 359 US, at 245, 3 L Ed 2d, at 783, we held that the National Labor Relations Act pre-empts the jurisdiction of state and federal courts to regulate conduct 'arguably

subject to § 7 or § 8 of the Act.' On their face, the above-quoted provisions of the Act at least arguably either permit or forbid the union conduct dealt with by the judgment below. For the evident thrust of this aspect of the federal statutory scheme is to permit the enforcement of union security clauses, by dismissal from employment, only for failure to pay dues. Whatever other sanctions may be employed to exact compliance with those internal union rules unrelated to dues payment, the Act seems generally to exclude dismissal from employment." (At p. 284.)

The Supreme Court alluded to the fact that the Idaho Supreme Court in affirming the Idaho judgment for damages attempted to base the decision on Idaho contract law. The court concluded that that was not a sufficient basis to nullify the preemption doctrine. The court reviewed its efforts to find a basis for sustaining state action, one of which was "on whether the States purported to apply a remedy not provided for by the federal scheme, e.g. Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 479-480, . . ." The court then concluded:

"The failure of alternative analyses and the interplay of the foregoing policy considerations, then, led this Court to hold in Garmon, 359 US, at 244, (3 L Ed 2d at 782):

"'When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National

Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congree and requirements imposed by state law.'" (At p. 291.)

It is true that in the case at bar that Hill complained of incidental conduct which might not directly involve his employment, such as the fact that Daley used abusive language, called Hill foul names and that Daley invited him outside on one occasion for a fight. Also that Daley advised the state unemployment insurance people that Hill had refused work assignments and was therefore not eligible for unemployment benefits. It is undoubtedly true that there was bitter animosity between the two men which was reflected in a variety of ways. However, we think the words of the United State Supreme Court in Borden, supra, are controlling. To paraphrase: "The 'crux' of the action (Gonzales, 356 U.S. at 618) concerned [Hill's] employment relations and involved conduct arguably subject to the Board's jurisdiction."

". . . 'our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered.' (Emphasis added.)[4/] [P] In the present

---

4/ Emphasis added by U.S. Supreme Court.

case the conduct[5/] on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards." In the case at bar the "crux" of the action concerned Hill's employment. The "crux" of the action was arguably subject to Board's jurisdiction. The conduct on which the suit is "centered" is conduct which is within the Board's exclusive primary jurisdiction to apply federal standards.

In the case at bar the trial court committed the same error which was committed by the Supreme Court of Ohio in Perko. The trial court here and the Supreme Court of Ohio there concluded that the federal preemption doctrine did not apply to a state action "'to recover damages for a common law tort, which is also an unfair labor practice.'" The common law tort to which the Ohio Supreme Court referred was that "'certain named officials thereof [of the local union] committed a common-law tort against him [Perko] by conspiring to deprive him of his right to earn a living and interfering with his contract of employment.'" The United States Supreme Court held that the Ohio Supreme Court was in error because "the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations." (Emphasis ours.)

5/ Emphasis added by U.S. Supreme Court.

The fact that in the case at bar Hill sought damages for mental anguish should not change the result here any more than such a claim for mental anguish changed the result in Borden, supra and Lockridge, supra. It is the "crux" of the causes of action, the "conduct" which is complained of which controls whether federal or state courts have jurisdiction, not the type of damage which is caused by such conduct.

In the case at bar we are not required to speculate whether or not the wrongs which Hill complains of were "arguably" within the jurisdiction of the N.L.R.B. Here the N.L.R.B. did in fact assume jurisdiction, it did find that Local 25 was guilty of unfair labor practices in making work assignments of Hill in the Dinwiddy-Simpson job for the construction of the "Crocker Citizens Bank" building and awarded Hill $2,517 back wages for discriminating conduct with reference to that job. Hill filed other charges of unfair labor practices with the N.L.R.B. but voluntarily withdrew them.

We presume that the N.L.R.B. would have correctly decided the additional matters and would have granted the relief, if any, to which Hill was legally entitled if Hill had pursued the matter further before the N.L.R.B. But Hill was apparently dissatisfied with the award of $2,517 from the N.L.R.B. and sought the more generous bounties of a common law jury. Such an approach might have been permissible under Weber v. Anheuser-Busch, Inc., supra, but that concept was repudiated by Local No. 207 v.

Perko, supra, wherein the U.S. Supreme Court said if the union conduct is "arguably" within the jurisdiction of the N.L.R.B., state jurisdiction is preempted even though state jurisdiction may award greater relief than would be awarded by the N.L.R.B.

Here there is no doubt in our view that the "crux" of the conduct of the defendants complained of by Hill related directly or indirectly to his employment and work assignments. The key allegation of his complaint was that the defendants "made repeated oral threats to the effect that as long as they controlled job dispatching procedures that [Hill] would be and he was given inferior assignments and be bypassed for work assignments." (Emphasis ours.) That he was threatened with actual and de facto expulsion in "retaliation for his political activities" and defendants "further threatened to deprive [Hill] of his ability to earn a living as a carpenter." That "as a proximate result of the intentional and wrongful discriminatory conduct" (emphasis ours) Hill suffered certain damages.

We are unable to distinguish the case at bar from Association of Journeyman v. Borden, supra, Inroworkers' Union v. Perko, supra, and Motorcoach Employees v. Lockridge, supra.

Hill contends that this is an action at common law for damages for intentional infliction of emotional distress. But in Borden, supra, the U.S. Supreme Court said that it is not significant that the complaint "sounded in contract

as well as in tort." The court also said: "It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction. Rather as stated in Garmon, supra (359 U.S. at 246) '[o]ur concern is with the delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered.' (Emphasis added.)" (At p. 698.)

In both Borden and Lockridge the plaintiff sought damages for emotional and mental dis tress. As we have already stated, in each instance the U.S. Supreme Court in effect held that that was not determinative, that the determinative factor was the "areas of conduct" not the type of damage that is inflicted as a proximate result of the conduct. The very purpose of having one uniform national policy administered by a single specially constituted tribunal would be completely frustrated and defeated it it were legally permissible for juries in the fifty different state tribunals to award different amounts of damage for conduct which is essentially within the jurisdiction of the N.L.R.B. A labor union could be completely wiped out financially by such awards resulting in substantial detriment to other innocent union members whose livelihood depends upon continued union representation. A collusive action with such a result is not beyond the realm of possibility. If the award of damages by the N.L.R.B. is inadequate for any reason, the remedy lies with the federal government, not by resort to the tribunals of the fifty different states. Hill seeks to distinguish Borden, supra, and

Perko, supra, on the ground that each case involved a single act of unfair labor practice rather than a course of conduct which is what is involved in the case at bar. We regard this as a difference without legally significant distinction. We are cited to no authority that holds that N.L.R.B. jurisdiction is limited to single acts of unfair labor practice and that it has no jurisdiction of a course of conduct.

For purposes of illustration only we note that under section 187 of the Labor Management Act (29 U.S.C.A.) Congress did expressly reserve to the injured party causes of action for damages in U.S. District Courts "or in any other court having jurisdiction of the parties" resulting from an unfair labor practice under section 158 (b) (4) (secondary boycotts). If the Congress had intended to allow the fifty different states power to award damages for the type of action arising out of the unfair labor practices alleged in the case at bar, it would have been an extremely simple matter to enlarge the provision of section 187 to encompass such actions.

What we have said is not in conflict with Alcon v. Ambro Engineering, Inc., 2 Cal. 3d 493, which is relied on by Hill. There Alcon was expelled from a union solely on racial grounds. The court held that he had a cause of action for damages for intentionally inflicting emotional distress. The California Supreme Court did not discuss the preemption doctrine. No one raised that point presumably because the case related to union membership rather than unfair

labor practices in the course of actual employment. In International Association of Machinists v. Gonzales, the U.S. Supreme Court recognized that the expulsion of a member from a union related to purely internal union matters and did not relate to employment or discriminatory practices which constituted unfair labor practices within the arguable jurisdiction of the N.L.R.B. An action for damages for expulsion from a union was then recognized as an exception to the preemption doctrine and such an action could be maintanied in a state tribunal. Alcon v. Ambro Engineering Inc. comes within this exception. That case, unlike this case, may well involve constitutional questions. The case at bar, unlike Shaw v. MGM, Inc., 37 Cal.App.3d 587; Mogallanes v. Local 300, 40 Cal.App.3d 809 and Breitegger v. Columbia Broadcasting System, 43 Cal.App.3d 283, is not an action under section 301 of the National Labor Relations Act (29 U.S.C.A.) to recover damages or otherwise enforce a collective bargaining agreement. Such an action is expressly permitted by federal law and the state and federal courts are given concurrent jurisdiction of such an action by federal law. Although the complaint in the case at bar makes casual reference to threatened union expulsion, it is clear that no expulsion in fact occurred and that the primary thrust of the complaint and the evidence (the "crux" of the case) arguably constituted unfair labor practices. The case at bar, therefore, is within the general rule and the cause of action here is preempted by federal policy.

We conclude that the trial court herein was without jurisdiction and that jurisdiction was vested in the N.L.R.B.

The judgment is reversed with instructions to render judgment for the defendants and dismiss the action.

CERTIFIED FOR PUBLICATION.

LORING, J.*

We concur:

STEPHENS, Acting P.J.
HASTINGS, J.

---

*Assigned by Chairman of the Judicial Council.

APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

SEP 10 1975

I have this day filed Order

HEARING DENIED

In re: 2 Civ. *No.* 43751

Hill

vs.

United Brotherhood of Carpenters

Respectfully,

G. E. BISHEL
Clerk

81248-877 8-75 3M OSP

APPENDIX C

Section 7 of the Labor Management Relations Act of 1947 (29 U.S.C. §157) provides as follows:

"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

Section 8 of the Labor Management Relations Act of 1947 provides in pertinent part as follows:

"(a) It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and

regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor oragnization (A) if he has reasonable grounds for believing that such

membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents --

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . ."